



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC APPEAL NO. 1 OF 2017

KENYA COMMERCIAL BANK LIMITED.....APPLICANT

-VERSUS-

THOMAS RAILA OKERE.....RESPONDENT

RULING

BRIEF FACTS

The matter for determination is the Reference dated 7th September 2021 where the Applicant filed a Chamber Summons Application under Certificate of Urgency seeking for orders that:

1. This matter be certified urgent and be heard ex parte in the first instance (spent).
2. This Honourable court do issue a stay of execution of the Ruling and Order of the Learned Taxing Master made on 2nd September 2021, pending the hearing of this reference interparties (*spent*).
3. This Honourable Court do issue a stay of execution of the Ruling and Order of the Learned Taxing Master made on 2nd September 2021, pending full determination of this reference.
4. This Honourable Court be pleased to review, vary and or set aside the ruling of the Learned Taxing Officer, delivered on 2nd September 2021 particularly on Items 1 and 2 of the Respondent's Bill of Costs dated 9th September 2020 or in the alternative, the Respondent's Bill of Costs dated 9th September 2020 be remitted back for taxation before the same or another Taxing Officer, with appropriate directions on the question assessment.
5. The costs of this Reference be awarded to the Applicant.

The Application was based on grounds that:

- a) The Learned Taxing Officer erred in law and fact on taxing Item 1 on the instruction fees in the Respondent's Bill of Costs dated 9th September 2020 at Kshs.140,000/= by erroneously assuming that the subject matter of the Appeal was of a monetary nature and thereby erroneously reached a computation of instruction fees on the basis of the value of the subject matter under Schedule 6 Rule 1 (b) of the Advocates Remuneration Order 2014 by opting to use the Valuation Report on the Record of Appeal.
- b) The Taxing Officer erred in law and fact in failing to appreciate that the real subject matter of the Appeal which ought to have constituted the basis of computation of instruction fees was in the nature of a non-monetary value, being a dispute involving the question as to whether or not the subordinate court had jurisdiction to hear and determine the claim presented by the Respondent in his Plaint before the trial court, in view of the express provisions of Article 162 (2) (b) of the Constitution which was interpreted by the Appellant to restrict exclusive jurisdiction to the Environment and Land Court of the status of the High Court.
- c) The Learned Taxing Officer erred in law and in fact in failing to appreciate that the valuation report which she relied upon as the basis of arriving at the instruction fees was an irrelevant factor in view of the fact that the nature of the contested issues on appeal as set out in the Memorandum of Appeal and its outcome did not make any reference or have any impact on the pecuniary jurisdiction of the court and or otherwise involve any dispute of a monetary nature.
- d) The Learned Taxing Officer erred in law and in fact in failing to appreciate that the nature of appeal that was the subject of the

instruction fees was one of an interlocutory appeal arising from a preliminary objection while the main suit was still pending before the trial court, where the reliefs sought in the main suit were also of a non-monetary value in the nature of an order for permanent injunction with the result that the Taxing Officer's assessment of instruction fees on the basis of a monetary value was erroneous.

e) The Learned Taxing Officer erred in law and in fact in failing to appreciate that the Appeal having been withdrawn by the Appellant without proceeding to confirmation for hearing or otherwise proceeding with the hearing, the question of instruction fees was required by law to be constituted at 85% of the allowable instruction fees as contemplated under the provisions of Schedule 6 (a) (i) (c) of the Advocates Remuneration Order 2014.

f) The Learned Taxing Officer erred in law and in fact in taxing item 2 of the Respondent's Bill of costs, being fees for getting up on trial at Kshs.46,666.70/= yet this was a Bill of Costs emanating from an Appeal and not from a trial, as set out in the Bill of Costs and the Learned Taxing Officer further erred in law by proceeding to presume in favour of the Respondent that the item could be allowed as getting fees on appeal, yet there was no request by the Respondent or leave to amend the Bill of costs or any order allowing such amendment, if at all, to justify such an award for a service that did not exist, contrary to the express provisions of Rule 71 of the Advocates Remuneration Rules. The Appellant was thus condemned on this Item without being afforded a hearing on non-pleaded matter contrary to the express provisions of Article 47 of the Constitution of Kenya as read with sections 3,4 and 5 of the Fair Administrative Actions Act 2015 and the mandatory rules on such pleadings.

g) The Learned Taxing Officer also failed to appreciate that Schedule 6 paragraph 4 of the Advocates Remuneration Order 2014, only provided for fees for getting up on appeal to awarded at the end of the hearing of an Appeal and only after certification by a judge in view of the extent or difficulty of the Appeal making it deserving of the award of fees for getting up on Appeal yet there was no such hearing of this Appeal and there was no such certification made by the judge in this Appeal to warrant an award for fees for getting up.

The Application was supported by the Affidavit of Faustin Osewe where she relied on the grounds of the Chamber Summons. On 13th September 2021, the court matter be canvassed by way of written submissions, the Applicant to serve the Application and written submissions within 5 days, the Respondent to file and serve his response and submissions within 7 days from the date of service and the matter to be mentioned before Ombwayo J on 29th September 2021 to confirm compliance and take a date for Ruling.

On 29th September 2021 when this matter came up for hearing, the court directed the Applicant file and serve submissions within 14 days and the Respondent to file and serve submission within 14 days of service.

I have perused this file and I do confirm that parties have failed to comply with the orders of the court. However, I have perused the reference and the supporting affidavit and do not find any fault by the taxing officer as she acted within her discretion and therefore this Reference is hereby dismissed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 11TH DAY OF MARCH, 2022

ANTONY OMBWAYO

JUDGE

This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.